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9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 SUCCESSFACTORS, INC, a Delaware
corporation,

14 Plaintiff,

15 vs.

16 SOFTSCAPE, INC., a Delaware corporation,
17 and DOES 1-10, inclusive,

18 Defendants.
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Case No. CV 08-1376 CW (BZ)

**DECLARATION OF JEFFREY M.
RATINOFF IN SUPPORT OF MOTION
FOR ADMINISTRATIVE RELIEF TO
FILE EXHIBITS 2-4 OF THE REPLY
DECLARATION OF HENRY Z.
CARBAJAL III UNDER SEAL**

Date: September 3, 2008

Time: 10:00 a.m.

Judge: Honorable Bernard Zimmerman

Location: Courtroom G 15th Floor

Complaint filed: March 11, 2008

Trial Date: June 1, 2009

1 I, Jeffrey M. Ratinoff, declare:

2 1. I am an attorney licensed to practice law before all courts in the State of California,
3 and the United States District Court for the Northern District of California. I am Of Counsel with
4 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. ("Mintz Levin") in its Palo Alto, California
5 office and I, along with other attorneys at Mintz Levin, and Ronald M. Davids, are attorneys of
6 record for Defendant Softscape, Inc. (hereinafter "Softscape" or "Defendant"). I submit this
7 declaration in support of SuccessFactors' Motion for Administrative Relief to File Under Seal
8 Exhibits to the Reply Declaration of Henry Z. Carbajal III in Support Of Plaintiff SuccessFactors,
9 Inc.'s Motion to Compel ("Carbajal Declaration"). *See* Docket No. 200.

10 2. I have personal knowledge of the matters set forth herein except as to those matters
11 set forth on information and belief, and as to those I am informed and believe them to be true and
12 could and would competently testify thereto.

13 3. On April 23, 2008, the Court entered a Protective Order in this case. *See* Docket No.
14 89. Pursuant to Sections 2.3 and 2.4 of the Protective Order, documents containing information
15 subject to the right of privacy may be designated as confidential. *See id.* at pp.2-3. Further,
16 pursuant to Section 10 of the Protective Order, any documents filed in this action containing
17 information designated as confidential under the Protective Order must be filed under seal in
18 accordance with Civil Local Rule 79-5. *See id.* at p. 10.

19 4. Pursuant to the terms of the Protective Order, Softscape produced certain mobile
20 phone records for several non-party Softscape employees (SSHC000002, SSHC000240-246,
21 SSHC000908-910, SSHC000914), the spouse of one non-party employee (SSHC000915-916) and
22 the business phone records for a non-party employee working from Softscape's Sydney, Australia
23 office (SSHC000911-913), which were attached as Exhibits 2 through 4 to the Carbajal Declaration.

24 5. With the exception of the Sydney office records, all records identify the personal
25 mobile phone numbers and phone company account numbers for the various custodians. I am also
26 informed and believe that all of the phone records contain phone numbers for non-parties that are
27 not employed by Softscape, as well as the private home and mobile phone numbers for several
28 Softscape employees.

1 6. Softscape agreed to produce these phone records in response to SuccessFactors’
2 requests for production calling for the same on the condition that they be treated as “Highly
3 Confidential – Outside Attorney’s Eyes Only” under the Protective Order. This high level of
4 protection was and continues to be necessary to protect the privacy interests of non-parties whose
5 account numbers and phone numbers appear on these records.

6 7. The phone records attached as Exhibits 2 through 4 are subject to the
7 constitutionally-based right of privacy, which is recognized by courts in the Ninth Circuit. *See*
8 *Breed v. United States Dist. Ct. for Northern District*, 542 F.2d 1114, 1116 (9th Cir. 1976); *accord*
9 *Soto v. City of Concord*, 162 F.R.D. 603, 616 (N.D.Cal. 1995); *Keith H. v. Long Beach Unified*
10 *School Dist.*, 228 F.R.D. 652, 657 (C.D.Cal. 2005). Further, in cases where California state law
11 claims are asserted such as this one, “[t]o the extent privacy is a matter of privilege under state law,
12 federal courts will honor the privilege and protect the responding party from discovery.” *See Oakes*
13 *v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 284 (C.D.Cal. 1998) (applying California’s
14 constitutional right of privacy in a diversity case). In that regard, California has a strong policy of
15 protecting the identities and personal information of non-parties, including their telephone numbers.
16 *See Planned Parenthood Golden Gate v. Superior Court*, 83 Cal.App.4th 347, 357-60 (2000); *see*
17 *also Brooks v. Motsenbocker Advanced Developments, Inc.*, 2008 WL 2446205 (S.D.Cal. June 13,
18 2008) (excluding private numbers from production where not related to business purposes).

19 8. Even where discovery warrants the disclosure of telephone numbers and phone
20 records, such information and documents are normally disclosed under a protective order requiring
21 that the records be maintained in confidence. *See, e.g. Keith H.*, 228 F.R.D. at 657-58; *Putnam v.*
22 *Eli Lilly and Co.*, 508 F.Supp.2d 812, 814-15 (C.D.Cal. 2007); *Bryant v. Mattel, Inc.*, 2007 WL
23 5416681 at *9 (C.D.Cal. Jan. 26, 2007).

24 9. I believe that the filing of the phone records and the information contained therein in
25 the public record would violate the right of privacy afforded to the persons whose records are
26 attached as Exhibits 2 through 4 of the Carbajal Declaration, as well as the right of privacy afforded
27 to the non-parties whose numbers are listed in those records.

28 10. Further, I believe that the filing of the phone records and the information contained

1 therein in the public record would likely subject the persons whose phone records are attached as
2 Exhibits 2 through 4 of the Carbajal Declaration, as well the non-parties whose numbers are listed
3 in those records, to unwanted annoyance and harassment. This case and the Court's files are closely
4 watched by individuals posting on various Internet discussion groups and blogs. As such, it is
5 likely that these posters may publicly post or call the numbers listed in those records without a good
6 faith basis to do so. I also believe that the public filing of Exhibits 2 through 4 of the Carbajal
7 Declaration could subject or expose the persons whose personal and private information is disclosed
8 to identity theft.

9 11. In light of the foregoing, I believe good cause exists to file Exhibits 2 through 4 of
10 the Carbajal Declaration under seal.

11 12. Softscape previously designated Exhibit 1 and Exhibits 5 through 7 to the Carbajal
12 Declaration under the terms of the Protective Order. However, Softscape does not request that these
13 documents be filed under seal.

14 I declare under penalty of perjury, under the laws of the State of California that the
15 foregoing is true and correct, and that this declaration was executed in Palo Alto, California.

16 Dated: August 26, 2008

/s/ Jeffrey M. Ratino

JEFFREY M. RATINOFF

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SUCCESSFACTORS, INC, a Delaware
corporation,

Plaintiff,

vs.

SOFTSCAPE, INC., a Delaware corporation,
and DOES 1-10, inclusive,

Defendants.

Case No. CV 08-1376 CW (BZ)

**[PROPOSED] ORDER GRANTING
PLAINTIFF'S MOTION FOR
ADMINISTRATIVE RELIEF TO FILE
EXHIBITS 2-4 OF THE REPLY
DECLARATION OF HENRY Z.
CARBAJAL III IN SUPPORT OF
PLAINTIFF'S MOTION TO COMPEL
UNDER SEAL**

1 Having considered Plaintiff's Motion for Administration Relief to File Under Seal Plaintiff
2 SuccessFactors, Inc.'s ("SuccessFactors" or "Plaintiff") Brief and Declaration Exhibits in Support
3 of Motion to Compel Production of Documents, Further Interrogatory Answers and Proper
4 Confidentiality Designations and the supporting Declarations of Counsel, and good cause appearing
5 therefore, the Court, HEREBY ORDERS that Exhibits 2 through 4 to the Reply Declaration of
6 Henry Z. Carbajal III in Support of SuccessFactors' Motion to Compel Production of Documents,
7 Further Interrogatory Answers and Proper Confidentiality Designations are TO BE FILED UNDER
8 SEAL. These exhibits consist of telephone records, which are subject to the constitutional right of
9 privacy afford to the individuals that these records belong to and those of non-parties whose
10 telephone numbers are listed therein. The public disclosure of the records and the information
11 contained therein would infringe upon their right of privacy, as well as possibly expose them to
12 unwarranted annoyance and harassment, and therefore the need to file these records under seal
13 outweighs the public's interest of having access to these documents.

14 **IT IS SO ORDERED.**

15 Dated: _____
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17 _____
The Honorable Bernard Zimmerman
United States Magistrate Judge
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